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IN THE

Supreme Court of the United States

OCTOBER TERM, 1969

Docket No. 1364

RALPH TROPIANO,

Petitioner,

vs.

STATE OF CONNECTICUT,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF CONNECTICUT

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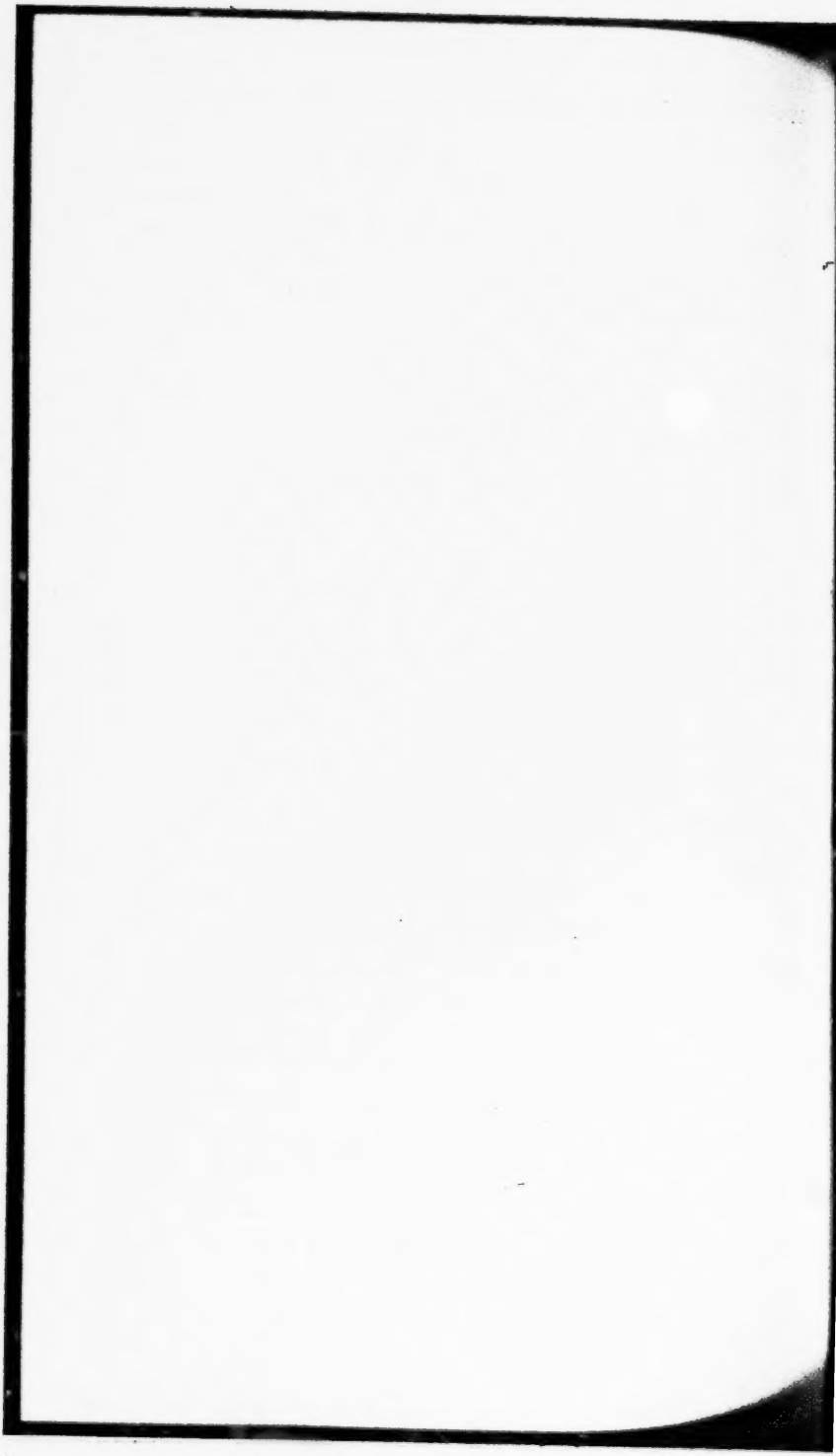

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Petitioner, Ralph Tropiano, prays that a writ of certiorari issue to review the judgment of the Supreme Court of the State of Connecticut hereinafter described.

Opinion Below

The opinion of the Supreme Court of the State of Connecticut, reported in 158 Conn. 412, A. 2d , is printed in the appendix hereto, *infra.*

Jurisdiction

The judgment of the Supreme Court of the State of Connecticut sought to be reviewed—a final judgment af-

firming petitioner's conviction for conspiracy—is dated September 24, 1969. The opinion or "decision" is stamped "Decision Announced Oct 7 1969." A timely motion for re-argument was denied, dated October 28, 1969, entered October 29, 1969.* By order of Mr. Justice Harlan the time within which to file a petition for certiorari in this case has been extended to and including March 28, 1970.

On October 29, 1969 Petitioner Tropiano filed in the Supreme Court of Connecticut an "Addendum To And Amplification Of Motion To Re-argue", urging a certain point of electronic eavesdropping based on then recent developments in connection with the case of *United States* v. *White,* no. 46, this Term (U. S. S. Ct.). This "addendum", filed by Tropiano's then Connecticut State counsel, Ira B. Grudberg, Esq., of New Haven, Connecticut, was filed one day before Mr. Grudberg received notice (October 30, 1969) that the above mentioned motion for re-argument had been denied. Inquiry by undersigned counsel (Mr. Glasser) at the office of the Clerk of the Supreme Court in Connecticut elicited that the Supreme Court of Connecticut apparently has never ruled on the "addendum" to the motion for re-argument. On advice of Connecticut counsel (Mr. Grudberg) we take it that there is no proper

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* It has just come to our attention that, in the certified record which we are filing herewith, the hand-written notation denying the motion for re-argument (dated October 28, 1969)—see the last sheet in the certified record, immediately preceding the Clerk's certification—is not accompanied by any reference to the fact that this order denying the motion for re-argument was entered *October 29*, 1969. On or about January 12, 1970, undersigned counsel, Mr. Glasser, was informed on the telephone by the Clerk in New Haven, Connecticut, that the date of entry of this order is October 29, 1969; and we so stated in our application of January 14, 1970 to Mr. Justice Harlan for an extension of time within which to file this petition for certiorari.

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further procedure in the Connecticut Supreme Court to be pursued in connection with this "addendum". We therefore treat the points raised in said "addendum" as having been duly preserved for the purposes of this petition for certiorari.

The jurisdiction of this Court is invoked under 28 U.S.C. §1257(3), since the petitioner is claiming rights, privileges or immunities under the Fourth Amendment (unconstitutional arrest, search and seizure), the Fifth Amendment (right of grand jury indictment), the Sixth Amendment (right of confrontation) and the Fourteenth Amendment (due process of law and equal protection of the laws) of the Constitution of the United States, and under 47 U.S.C. §605; and since there is necessarily drawn in question the validity of State statutes (Conn. Gen. Stats. §§54-42, 54-43, 54-45, 54-46) on the ground of their being repugnant to the Constitution of the United States.

Questions Presented

Petitioner Ralph Tropiano was convected for conspiracy to bribe police officers to get "protection" for gambling and illegal liquor operations. The prosecution was commenced by Tropiano's being arrested under an undisputedly unconstitutional bench warrant based on an unsworn "information" by the State Attorney. Tropiano had long been a special target of police attention in Connecticut as an alleged "organized crime boss". The within conspiracy trial proofs hardly touched at all on any "independent" proof of any conspiratorial conduct or speech by Tropiano himself. Instead, the lengthy trial record consists almost entirely of proofs concerning other persons, including a mass of rank hearsay statements of police officers in the course of their contacts with Tropiano's alleged co-conspirators; much of this latter hear-

say came from electronically eavesdropped conversations. The questions are:

1. Was the evidence insufficient—almost to the point of "no evidence"—to convict Tropiano?

2. On the facts of this case—including the unconstitutional arrest and the use of an unsworn "Information" rather than a grand jury Indictment—should the conviction be reversed, and the prosecution be dismissed, on the grounds that (a) *Hurtado* v. *California*, 110 U. S. 516, is inapplicable or if applicable should be overruled; (b) the Connecticut statutes allowing prosecution by Information, rather than by indictment, and arrest by derivative bench warrant (Conn. Gen. Stats. §§54-42, 54-43, 54-45, 54-46), are unconstitutional, as here applied, under the Fourth, Fifth and Fourteenth Amendments; and (c) that under the principle of *Pennoyer* v. *Neff*, 95 U. S. (5 Otto) 714, and the Fourteenth Amendment due process protections as to jurisdiction of the person, the State of Connecticut never obtained constitutional jurisdiction of the person of petitioner Tropiano for the purposes of this prosecution?

3. In a case involving a conspiracy to offer money to police officers to influence their behavior illegally, where the police officers testify as to their own acts and declarations outside of the presence of the defendant, did not due process and the Sixth Amendment right of confrontation require the exclusion of such testimony, or the striking of such testimony, or a jury instruction that such acts and declarations of the police officers were not constitutional evidence against such defendant? Were not these constitutional protections the more necessary in a case like this one which was so highly potential of the most inflammatory prejudice in view of the defendant's

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alleged involvement in "organized crime" and the ever-present danger of excessive zeal on the part of policemen and public prosecutors in such a case? Allowing even the farthest stretch to the hearsay exception for declarations of "co-conspirators", how, conceivably, could this testimony of the police officers as to their own doings and words—revealed in this trial record as having been prompted by their ardor to get Tropiano's alleged co-conspirators to drag him into the investigative web—how could this tendentious testimony of the police officers be treated as constitutionally probative?

4. Even within the concededly conventional framework of the co-conspirators' hearsay exception, was it consistent with due process and with the Sixth Amendment right of confrontation to receive in evidence various merely narrative co-conspirators' declarations, several of which were moreover of an inflammatorily prejudicial nature against Tropiano; and, in the case of one alleged co-conspirator witness (Guglielmo), consisted of testimony which not only did not "connect up" with Tropiano at all but in fact concluded with the revelation that the principal other co-conspirator (DiBella) had declared Tropiano to be an innocent man—but meanwhile the entire remainder of this latter testimony (Guglielmo), purporting to establish the whole inception of the conspiracy, having lodged in the record and in the minds of the jurors?

5. Was petitioner Tropiano denied a fair due process trial and the Sixth Amendment right of confrontation by the trial Court's refusal to make available to defense counsel extensive notes and reports of the main prosecution witness, police officer Reynolds; and by other rulings of the trial Court which improperly restricted the defense cross examination of Reynolds?

6. Was petitioner Tropiano denied a fair due process trial by variances in the proof which showed multiple conspiracies instead of the single conspiracy charged?

7. Was petitioner Tropiano denied a fair due process trial and the Sixth Amendment right of confrontation by the trial Court's rulings which prevented the defense from exploring, in regard to the co-conspirator witness Guglielmo, his motive for testifying in light of his having pleaded guilty and having indicatedly obtained clemency or a promise of clemency?

8. Was the electronic eavesdropping in this case—consisting of officer Reynolds' recording a conversation with Guglielmo by a concealed minifon-type device and of officers Reynolds' and Ahearn's recording telephone conversations with co-conspirator DiBella—and the obtaining of investigative leads and trial evidence from this electronic surveillance, violative of petitioner Tropiano's rights under the Fourth Amendment and the Federal Communications Act (47 U.S.C. §605)?

9. In this conspiracy case which was so weakly proved against petitioner Tropiano, did the several violations of constitutional and legal rights presented in the above questions, result cumulatively in the denial to Tropiano of a fair due process trial and of his related constitutional rights under the Fourth, Fifth, Sixth and Fourteenth Amendments?

(As to some of the above questions, there may be a problem of adequate jurisdictional preservation of the issues in the within State Court proceedings. All such possible problem items will be fully noted at appropriate places *infra*.)

Constitutional and Statutory Provisions Involved

The case involves the Fourth Amendment (arrest, search and seizure), the Fifth Amendment (right of grand jury indictment), the Sixth Amendment (right of confrontation), and the Fourteenth Amendment (due process and equal protection), of the United States Constitution.

It also involves former Art. 1 §8 of the Connecticut State Constitution, which provides in pertinent part:

> "• • • no person shall be holden to answer for any crime, the punishment of which may be death or imprisonment for life, unless on a presentment or an indictment of a grand jury • • •."

It also involves former Art. 1 §8 of the Connecticut necticut General Statutes (as they read at the times pertinent hereto):

> "§54-42 Original information in superior court
> An original information may be filed in the superior court against any person accused of crime in any case in which an inferior court may, at its discretion, punish him or bind him over for trial, and in any other case upon the order of the superior court. (1949 Rev., §8764.)"

> "§54-43. BENCH WARRANT
>
> Upon the representation of any state's attorney that he has reasonable ground to believe that a crime has been committed within his jurisdiction, the superior court or, when said court is not in session, any judge thereof, may issue a bench warrant for the arrest of the person or persons complained against, and in such case shall, except in cases punishable by death or life imprisonment, fix

a bond for the appearance of such person or persons in such amount as to said court or to such judge appears reasonable. When any person is arrested on a bench warrant issued by order of the superior court or, when said court is not in session, by a judge thereof, the officer or indifferent person making such arrest shall forthwith bring such person before the clerk or assistant clerk of the superior court for the county where such warrant was issued, which clerk or assistant clerk shall thereupon advise such person that he has a right to retain counsel, that he has a right to refuse to make any statement, and that any statement makes may be introduced in evidence against him, and shall order such person to enter into a recognizance with surety to the state in such sum as said court or such judge has fixed conditioned that such accused person shall appear before the superior court having criminal jurisdiction then in session or next to be held in and for the county where such bond is required, to answer to the bench warrant and information filed in such case; and on his failure to enter such recognizance or if the offense charged in such bench warrant and information is not bailable, such clerk or assistant clerk shall issue a mittimus committing such person to jail until he is discharged by due course of law. (1963, P.A. 126, § 2.)"

"§ 54-45. WHEN GRAND JURY IS REQUIRED

The superior court may, when necessary, order a grand jury of eighteen electors of the county where said court is sitting to be summoned, impaneled and sworn to inquire after and present such offenses as are cognizable by said court; and no person shall

be put to plea or held to trial for any crime the punishment of which may be death or imprisonment for life unless an indictment has been found against him for such crime by a grand jury legally impaneled and sworn, and no bill shall be presented by any grand jury unless at least twelve of the jurors agree to it. (1949 Rev. § 8747.)"

(The above §54-45 was amended in 1965—subsequent to the herein operative dates—to read as follows:

"§ 54-45. WHEN GRAND JURY IS REQUIRED. ALTERNATE GRAND JURORS

The superior court may, when necessary, order a grand jury of eighteen electors of the county where said court is sitting to be summoned, impaneled and sworn to inquire after and present such offenses as are cognizable by said court. Said court may, in its discretion, order one or two additional electors to be added to the grand jury as alternate grand jurors. Such alternate jurors shall be sworn separately from those constituting the regular panel and shall not counsel or confer with members of the regular panel as to any matters before the grand jury unless they become a part of the regular panel as hereinafter provided. They shall attend the sessions of the grand jury and shall be seated with or near the members of the regular panel, with equal opportunity to see and hear all matters adduced in the proceedings. If for any reason a grand juror is unable to further perform his duty, the court may excuse him and if any grand juror is so excused or dies, the court may order that the alternate juror or, if more than one,

that one who is designated by lot drawn by the clerk of the superior court shall become a part of the regular panel and the inquiry shall then proceed as though such grand juror had been a member of the regular panel from the beginning of the inquiry. No person shall be put to plea or held to trial for any crime the punishment of which may be death or imprisonment for life unless an indictment has been found against him for such crime by an grand jury legally impaneled and sworn, and no bill shall be presented by any grand jury unless at least twelve of the jurors agree to it. (1965, P.A. 173.)

1965 Amendment

Added sentences 2-5."

"§54-46. Information in cases not capital

For all crimes not punishable by death or imprisonment for life, the prosecution may be by complaint or information. (1949 Rev., §8775.)"

"SEC. 54-197. CONSPIRACY. Any person who combines, confederates or agrees with another or others to accomplish any unlawful object by lawful means, or any lawful object by unlawful means, or any unlawful object by unlawful means, if one or more of such persons do any act in furtherance of such combine, confederation or agreement, shall be fined not more than five thousand dollars or imprisoned not more than fifteen years or both, provided, if the crime which is the object of such combination, confederation or agreement is a misdemeanor, such person shall be subject to the same penalty as is provided by statute for the commission of the mis-

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demeanor. No officer or member of any lawful organization shall be held liable for the unlawful acts of individual officers, members or agents of such organization except upon proof of participation in or authorization of such acts or of the ratification thereof. (1949 Rev., S. 8876; 1955, S. 3352d.)"

It also involves 47 U.S.C. §605, reading as follows:

"§ 605. Unauthorized publication or use of communications

No person receiving or assisting in receiving, or transmitting, or assisting in transmitting, any interstate or foreign communication by wire or radio shall divulge or publish the existence, contents, substance, purport, effect, or meaning thereof, except through authorized channels of transmission or reception, to any person other than the addressee, his agent, or attorney, or to a person employed or authorized to forward such communication to its destination, or to proper accounting or distributing officers of the various communicating centers over which the communication may be passed, or to the master of a ship under whom he is serving, or in response to a subpoena issued by a court of competent jurisdiction, or on demand of other lawful authority; and no person not being authorized by the sender shall intercept any communication and divulge or publish the existence, contents, substance, purport, effect, or meaning of such intercepted communication to any person, and no person not being entitled thereto shall receive or assist in receiving any interstate or foreign communication by wire or radio and use the same or any informa-

tion therein contained for his own benefit or for the benefit of another not entitled thereto; and no person having received such intercepted communication or having become acquainted with the contents, substance, purport, effect, or meaning of the same or any part thereof, knowing that such information was so obtained, shall divulge or publish the existence, contents, substance, purport, effect, or meaning of the same or any part thereof, or use the same or any information therein contained for his own benefit or for the benefit of another not entitled thereto: *Provided,* That this section shall not apply to the receiving, divulging, publishing, or utilizing the contents of any radio communication broadcast, or transmitted by amateurs or others for the use of the general public, or relating to ships in distress. June 19, 1934, c. 652, Title VI, § 605, 48 Stat. 1103."

Statement of the Case and of How the Federal Questions are Presented*

This petition seeks review of a final judgment and decision of the Supreme Court of the State of Connecticut (appendix hereto, *infra*) which affirmed a judgment of the Superior Court for New Haven County convicting petitioner Tropiano, after a jury trial, on a charge of conspiracy to bribe police officers, and sentencing him to imprisonment for three to six years (R.17).

The charge was that the defendants conspired to bribe the police officers in question in order to get "protection" for illegal gambling and liquor activities in Hartford and New Haven Counties (R.5-7). In addition to

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* The certified record filed herewith consists of the printed record (a booklet of 119 pages on *yellow* paper) captioned in the Supreme Court of the State of Connecticut, entitled "Defendant's Appeal From The Superior Court For New Haven County", which printed record was used in the manner of an "appendix" record in the Court below, and which we cite *infra* as "R. —"; (2) the respective printed appendices bound in the printed briefs of the parties in the Court below, which supplement the aforementioned yellow-paper printed record under the Connecticut practice, and which we cite *infra* as "DA —" (for the defendant-appellant's brief-appendix) and as "SA —" (for the State's brief-appendix); (3) the proceedings in the Court below, consisting of the opinion, judgment and re-argument papers, which we cite by suitable description *infra*. In addition, we shall separately lodge with the Clerk of this Court a facsimile (but uncertified) copy of the stenographic minutes of the trial and of certain pre-trial and trial motion proceedings and other trial documents, to which appropriate reference is made *infra;* we have been advised by the office of the Clerk of this Court that the above described certified record satisfies the Rules and that we may lodge the additional papers just mentioned (which would have cost us in excess of $1,000 to obtain in a certified form under the practice of the Clerk of the Court below).

Tropiano, the other defendants so charged were DiBella, Guglielmo, Amaio and Licari (*ibid.*). The within trial of Tropiano was held separately as to him alone, after the other defendants had been tried first in a trial in which Licari was acquitted, Guglielmo pleaded guilty, and DiBella and Amaio were convicted on plea of not guilty.

This prosecution was commenced under a Connecticut State statutory procedure which allows prosecution by a State Attorney's "Information" instead of by grand jury indictment, "for all crimes not punishable by death or imprisonment for life" (Conn. Gen. Stats. §54-46). Adjunct to this Connecticut Information procedure—which is conducted on unsworn representations by the State Attorney (as was done in this case, R.2-7)—is a statutory arrest procedure by bench warrant in which it has apparently been common in the past (and occurred in this case, R.4-5) that the arrest warrant is issued and executed on the unsworn representations of the State Attorney as contained in his "Information"; for this bench warrant procedure see Conn. Gen. Stats. §54-43, quoted under our Statute heading, *supra*. The Information and the adjunct bench warrant in this case were both dated the same day, February 20, 1964 (R.2-5), and Tropiano was arrested on that day along with all the other defendants.*

On April 27, 1964 the Superior Court of New Haven County granted a motion to quash the Information of February 20, 1964 on the ground of certain defects in the conspiracy allegations with reference to the Connecticut bribery statute (Ryan, J., Memorandum of Decision, etc.,

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* Later, April 29, 1964, an amended Information was filed (R.5-7) (details *infra*).

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April 27, 1964).* Thereafter, on April 29, 1964 the State Attorney filed an amended Information (A.5-7). On May 7, 1964 Tropiano moved in the Superior Court "to discharge from custody" and "to discharge bail" on the grounds, *inter alia*, that the amended Information "is contrary to law", and requesting that it "be declared null and void" (R.7-8). The latter motion was denied by Judge Shannon of the Superior Court on June 2, 1964 (R.8).

We are mentioning these facts about the above motion to declare the amended Information null and void, because at a later stage in the pre-trial motion proceedings the latter motion became important on the question of whether Tropiano had moved timely to attack the amended Information on grounds of fundamental illegality or unconstitutionality. Thus, on September 20, 1965, which was the day before the start of the jury trial, Tropiano filed a motion to dismiss the case because the Court lacked constitutional jurisdiction of his person in that there was no probable cause shown by oath or affirmation for the issuance of the bench warrant of February 20, 1964 (R.9-10, 25), and when this latter motion was orally argued before trial Judge Meyers on September 21, 1965, the State Attorney argued in opposition that Judge Shannon's denial of the above mentioned motion of May 7, 1964 to annul the amended Information was preclusive of the motion of September 20, 1965 addressed to the unconstitutionality of the arrest process (transcript of September 21, 1965, pp. 34-35).** Defense counsel argued,

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* This item is not included in the certified record herein, as the parties did not include it in the printed record or in their printed appendices in the Court below, and we respectfully have not deemed it necessary for certification here as it does not directly affect any of our certiorari issues.

** This stenographic transcript of September 21, 1965 is one of the items, mentioned in the footnote at p. 14, *supra*, which we are lodging in facsimile form (uncertified) in the office of the Clerk of this Court.

in the pre-trial proceedings on September 21, 1965, that the bench warrant was a constitutional nullity under then recent Fourth-Fourteenth Amendment decisions of this Court, and that the Superior Court therefore lacked jurisdiction of the defendant's person (*id., passim*).* The motion was denied by Superior Court Judge Meyers (R.9-10), it was raised and argued on appeal in the Court below (Brief Of The Defendant-Appellant In The Supreme Court of Connecticut, Point VIII, pp. 46-50), and the Superior Court's ruling thereon was affirmed (opinion, § VII, appendix hereto, *infra.*)

The trial proofs against Tropiano will be summarized. There were four witnesses:

(1) The co-conspirator-defendant Guglielmo, after having entered a plea of guilty (R.109), testified in essence that commencing on September 17, 1963 he held several conversations with Detective Francis Reynolds of the West Hartford Police Department aimed at getting Reynolds to take money for protecting a horse betting operation in West Hartford; that in November 1963 Guglielmo

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* On that same occasion (September 20-21, 1965) defense counsel also moved and argued for suppression of evidence seized from Tropiano by the arresting officer on February 20, 1964 as a purported incident to said arrest; this issue of suppression of evidence has dropped out of the case for reasons not here relevant; but the issue of the constitutionality of the arrest remains in the case on the point of constitutional jurisdiction of the person (further details *infra*); and as will also further appear *infra*, the arrest issue merges with the issue presented in our Question No. 2, *supra*, as to the constitutionality of the use of an Information instead of an Indictment in this case. This question of Information versus Indictment was not articulated on Tropiano's behalf in the Courts below, but for reasons set forth *infra*, we urge that this Court may and should consider it in this certiorari proceeding.

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introduced Reynolds to the "contact man", the co-defendant DiBella; and that Reynolds evinced willingness to make such a deal with Guglielmo and DiBella (trial minutes, pp. 7-61; DA 36a-6a; Sa 3a-8a). The only mention in Guglielmo's testimony of the name of Tropiano was that the morning of the arrests, February 20, 1964, DiBella told Guglielmo in Court that Tropiano and the defendant Licari "have nothing to do with it. They did nothing • • • I don't know why they brought them in. • • • He told me that a fellow by the name of 'Whitey' [Tropiano's nickname] wanted nothing to do with this situation; he walked away from where they were" (Trial Minutes, p. 60; Da 4a-5a).

(Thus the prosecution witness Guglielmo was permitted to testify in this conspiracy trial against Tropiano, spreading before the jurors a mass of "conspiracy proof" about the whole alleged generating of the conspiracy, even though nothing in Guglielmo's testimony touched upon Tropiano in any way except for DiBella's declaration to Guglielmo that Tropiano was an innocent victim of the police dragnet in this case.)

(2) Detective Francis Reynolds, testifying for the prosecution—over several hundred pages of the trial record—described intricate and prolonged dealings with Guglielmo, DiBella and other defendants, but as to his alleged direct dealings with Tropiano Reynolds had only one incident to tell about, an alleged meeting between himself and Tropiano in a restaurant on January 30, 1964 in which Tropiano said "the only thing" he wanted was protection by another police officer, a Sergeant Ahearn of New Haven, for "crap games. Horses can come later"; that when Reynolds asked Tropiano how much he was willing to pay Ahearn, Tropiano said "quote a price", and Reynolds said "$475 to $500"; further testimony by Rey-

nolds that Tropiano "agreed" to this, and to giving Ahearn money for "a month in advance", or that Tropiano "agreed" to *anything*, was stricken by the trial Court and abandoned by the prosecutor, because Reynolds was unable to state any words allegedly spoken by Tropiano or any other manifestation by Tropiano that the latter ever "agreed" with Reynolds about anything or committed himself to anything in that conversation with Reynolds on January 30, 1964, or anywhere else at any other time with any other police officer or with anyone else (DA 14a-23a; DA 6a-11a; SA 8a-31a).*

Also of prime interest in Reynolds' testimony were the telephone tape recordings which Reynolds made, and as to which he testified, of numerous conversations between Reynolds and DiBella in which, after DiBella had one day "dropped" the name of Tropiano as a supposed principal in the proposed "protection" deal, Reynolds thereafter unremittingly kept pressing DiBella to bring him together with Tropiano in a personal meeting, and likewise to get a further personal conversation or meeting with Tropiano after the alleged January 30, 1964 meeting of Reynolds and Tropiano in which, as above noted, Reynolds asked Tropiano for money for Sergeant Ahearn for crap games in New Haven, and the prosecution's proof failed as to any acceptance or agreement by Tropiano concerning Reynolds' proposals. In other words, when Reynolds caught wind from DiBella of the name of Tropiano, Reynolds put on the most intensive kind of effort over a period of many weeks, to enmesh Tropiano into the investigative web, by constantly hammering at DiBella to lure Tropiano into direct contact with Reynolds. In all of these telephone conversations between Reynolds and DiBella it was invariably Reynolds who kept first bring-

* This was the sole proof in the entire trial of direct (non-hearsay) involvement by Tropiano.

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ing up Tropiano's name, and then cajoling DiBella into inflammatory and tendentious colloquies with Reynolds concerning the absent Tropiano. The transcripts of these telephone tape recordings appear at DA 27a-83a.

It should be emphasized also at this point, in connection with Reynolds' trial testimony and his DiBella telephone tapes, that these saturational efforts by Reynolds in these conversations with DiBella to keep building a "record" "against" Tropiano, were of course not acts or declarations of a co-conspirator, but were the doings and the words of the police officer himself. Yet, all of this absolutely inadmissible and fatally prejudicial material thus deliberately and provocatively generated by Reynolds in the conversations with DiBella was allowed to be received in evidence and to be used by the jury to convict Tropiano. Just how inflammatory much of this Reynolds-generated material was, in Reynolds' telephone conversations with DiBella, may be readily gathered from a scanning of the telephone-tape transcripts at DA27a-83a.

And it should be remembered, again, that all of this unconstitutional trial injustice occurred in the setting of a prosecutive conspiracy probatum which was utterly devoid of "independent" or "aliunde" proof of Tropiano's knowing and intentional participation in or commitment of himself to the alleged conspiracy, except for the abortive and probatively insufficient alleged incident of the Reynolds-Tropiano sole meeting on January 30, 1964 when Reynolds made financial proposals to Tropiano as to which the latter never manifested any acceptance or assent.

It should be mentioned at this place also that, undisputedly, the record is devoid of *any other* proof *aliunde* inculpating Tropiano, either before January 30, 1964 or after that date. Indeed there is no proof at all that *anything* allegedly discussed by the other co-conspirators with

Reynolds (or with Sergeant Ahearn, *infra*), neither the West Hartford horse-betting operations, nor any New Haven crap games or horse betting (nor any illegal liquor operations), were ever actually brought to fruition by any defendant or co-conspirator in this case, least of all by Tropiano.

It is hard for any fair-minded Judge or lawyer to resist the conclusion that the conviction of Tropiano in this case is an outright miscarriage of justice in sheer point of the insufficiency of the trial proofs; and that the conviction was made possible only by the inflammatorily prejudicial and unfair tactics of the prosecution which have been permitted and condoned by the Courts below.

Alas for the Public Morality, alas for constitutional standards of decent criminal justice in this country, alas that we are polluting our traditionally pure constitutional Environment to so contaminating a degree as to make one dread our future as a healthy humanistic society, when we let ends justify means by resorting to cynical procedures of criminal law enforcement in order to cast socially odious persons into prison. Can there be any doubt that, were the within petitioner Ralph Tropiano not a subject of the contemporary special odium attaching to alleged "organized crime bosses", this present petition for certiorari to review the egregious proceedings below would never have become necessary.

(Additional testimony by Reynolds, that he did actually receive money from DiBella, totalling $2,000, will be noted in connection with the testimony of Sergeant Ahearn, which we treat next.)

(3) Sergeant Ahearn of the New Haven Police Force testified only about conversations with DiBella, some of which were in the presence of Reynolds. In the first con-

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versation, on February 5, 1964, Ahearn said there was discussion of Reynolds' alleged financial negotiations with Tropiano on the preceding January 30. At this meeting Ahearn told DiBella that several arrest warrants for gambling had been issued and would have to be executed. Thereafter, on February 10, 1964 Licari was arrested on a gambling charge, and DiBella began urging Reynolds to get Licari's arrest quashed, with the aid of Ahearn. On February 12, DiBella gave Ahearn $1,200 in cash,* DiBella emphasizing the importance of getting Licari out of his arrest in New Haven and pressing for another meeting the next day with Ahearn.** The next day, February 13, Reynolds and DiBella met and DiBella gave Reynolds another $800, which Reynolds later that day divided with Ahearn. See DA 8a-9a, 11a-12a; SA 22a-34a.

(4) Detective Lieutenant Lovett of the West Hartford Police Department testified that he and other officers carried out extensive physical surveillance of all of Reynolds' meetings with Guglielmo and DiBella; but on the night when Reynolds is supposed to have met with Tropiano the surveillance was interrupted because Lovett thought he had been "spotted". Thus there was no physical surveillance proof of the alleged crucial single meeting be-

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* Undisputedly this money, plus another $800, was obtained by DiBella through a bank loan in West Hartford (Trial Minutes, pp. 475, 549-552).

** As seen, Licari was acquitted on the present conspiracy charges in the separate trial which preceded the within trial of Tropiano. Everything points to Licari's arrest troubles of February 10, 1964 (the arrest in the within prosecution did not occur until February 20, 1964), and to DiBella's concern over this arrest of Licari, as involving a situation in no way connected with the conspiracy charges against Tropiano in this case.

tween Reynolds and Tropiano on January 30, 1964. See SA 34a-38a; Trial Minutes, pp. 908-929, especially at 917-918.

Other relevant facts, and rulings of the Courts below —together with their bearing on how the federal questions are presented—are treated in our "Reasons", *infra.*

Reasons for Granting the Writ

I. Introductory: The miscarriage of justice and due process in this case.

Notwithstanding the doctrinal differentiations which this Court has suggested as to the scope of the Court's respective functions in reviewing the fairness of criminal proceedings in Federal and State Courts respectively (e.g., *McNabb* v. *United States,* 318 U.S. 332, 340-341), and notwithstanding also that this scope is larger in Federal than in State criminal cases, and notwithstanding the further consideration (which we realize must be faced by a certiorari petitioner seeking review of a State criminal conviction) that questions of sufficiency of evidence and of the fairness of rules of evidence or of rulings on admissibility of evidence, are questions less likely to be taken up by this Court in State than in Federal criminal cases, we nevertheless respectfully now present questions of this latter category as deserving certiorari in this particular case.

Men like petitioner Ralph Tropiano are, in a paradoxically sinister sense, a prime (if not the prime) threat to American courtroom justice in the present era. Our suggested paradox in this last sentence is intended to convey, of course, that the case of a Ralph Torpiano in its nature presents to police, prosecutors and Courts an almost irresistible temptation to violate fundamental law as a means of ensuring conviction of the defendant. In

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a good society it is worse for the society itself to behave badly in disciplining a reputedly "bad" individual, than for the society to fail of perfect "discipline" when the alternative would be an act of self-corrupting sin by the society itself.

Let us not be understood as here saying to this Court that we, counsel, are portraying our petitioner Ralph Tropiano as a bad man. Tropiano's goodness or badness is *or ought to be,* immaterial here; only the trial proofs on the particular charge here involved are material. But, unfortunately, the immaterial theme of Tropiano's repute was not quarantined from the case in the proceedings below. We ask for such quarantine at the supreme level of judicial integrity which prevails in this Court.

The present record violates such quarantine through its inclusion of inadmissible inflammatory proof, and through its inclusion of a judgment of conviction that seems incomprehensible except on the explanation that the end has thus far been deemed to justify the means in this case.

The acuteness of the threat to the decencies of American criminal justice posed by cases like this one, happens to be the more vivid in this particular case of Ralph Tropiano, because right now there is pending before this Court another petition for certiorari by this same individual, in which Tropiano claims that a like miscarriage of justice has struck him at the hands of the federal authorities in Connecticut. We refer to No. 1224, this Term, *Tropiano* v. *United States.* To the present-day "special task force" prosecutive and public furor against "organized crime"—of which the happenings in these Tropiano prosecutions are exemplary—there should be joined a "special task force" attitude on the part of the Courts to preserve the country's spirit of civilized

constitutional composure. A Constitution like ours was designed above all to prevent our governmental officialdom from lashing out in anger, or from resorting to that prosecutive demagogery which is even worse than anger; for anger passeth, but knowing evil endureth, and indeed it waxeth as it feeds on its own growth of callous.

Since are are asking the Court to discern the sheer miscarriage of probative justice in this case, we realize it is incumbent on us to address ourselves to the question of whether insufficiency of evidence in a State criminal case presents a "federal question" for this Court's certiorari jurisdiction. In principle *Thompson* v. *Louisville*, 362 U.S. 199, where due process was deemed by this Court to require promulgation of a "no evidence" rule for State criminal prosecutions, would seem to solve (favorably to our position) this problem of "federal question". True, this is not literally a "no evidence" case, but it borders precipitously on being one, as the only "evidence" for the requisite "independent" or "aliunde" proof of Tropiano's own acts or declarations allegedly bringing him into knowing membership in the conspiracy, namely, the single conversation with Detective Reynolds on January 30, 1964, shows Tropiano *at most* having knowledge of the existence of the conspiracy and engaging in discussion as to whether he should accept a "stake" in it; after which there is nothing, nothing of further proof of conspiracy by Tropiano—indeed on the contrary there is Guglielmo's testimony that DiBella on February 20, 1964, spontaneously absolved Tropiano of any such decision to participate.*

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* Everything in this trial record is consistent with the view of the evidence that DiBella and Guglielmo were dealing with Reynolds—and later DiBella with Sergeant Ahearn—in a venture in which DiBella was speaking for himself or for himself plus colleagues other than Tropiano, that DiBella "dropped" Tropiano's name in order to magnify himself and the proposed operation in the eyes of Reynolds, and that Reynolds (and his official associates) avidly turned the whole situation into an enmeshing pursuit of Tropiano.

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The "no evidence" rule of *Thompson* v. *Louisville, supra,* can scarcely justify its doctrinal foundation in the due process clause if it is confined only to its own puristic facts of, literally, "no evidence". The same due process doctrine favors an "almost no evidence" rule. The *Thompson* v. *Louisville* "no evidence" rule was enunciated, after all, in the setting of the due process rights of persons *accused of crime.* This is the area of the presumption of innocence and of the rule of proof of guilt beyond a reasonable doubt—"due process" values than which there are none more fundamental. Cf. the authorities cited and discussed at pp. 32-33 of Tropiano's above mentioned separate pending petition in No. 1224, this Term, showing that in proper cases trial and appellate Judges have the duty of screening the proofs to determine whether they are inadequate for submission to the jury because, in the opinion of the Judge, as a matter of law, reasonable men could not differ in deeming the proofs inadequate for conviction under the rule of reasonable doubt (e.g., *United States* v. *Melillo,* 275 F. Supp. 314 (E.D.N.Y., 1967—Weinstein, D.J.), collecting the authorities).

We submit it is no answer to our suggestion of an "almost no evidence" rule of due process, to say that it would be difficult for Courts to "draw the line" between "almost no evidence" and "no evidence". That is what Courts are for, to draw lines, judicially, case by case. The scoffer's question, "how many hairs make a beard", is incompatible with proper exercise of the judicial function.*

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* The scoffer starts by asking "how many hairs make a beard"; *answer,* "I don't know"; "do a hundred hairs make a beard"; *answer,* "oh yes"; "do fifty hairs make a beard"; *answer,* "well, yes, I think so"; "do forty"; *answer,* "well, alright, yes"—and finally the scoffer has his victim in the preposterous position of saying that, for example, "nineteen hairs make a beard", "but eighteen do not".

The "federal question" aspects of the evidentiary issues in this case appear to present no difficulty, then, in regard to our proffered issue as to insufficiency of the evidence in this State criminal prosecution.*

Our immediately preceding footnote shows that the issue of sufficiency of the evidence was properly raised by Tropiano in both of the Courts below. We are now to note that the specific way in which the question of insufficiency of evidence is most vital in this case is one that touches fundamental due process at its deepest core. The central axiom of fair due process trial is that guilt is individual and must be individually proved (by judicial process). In conspiracy prosecutions this axiom applies in the form of the requirement that there must be proof beyond a reasonable doubt against each individual defendant as to his actual, knowing participation in the conspiracy with knowledge of its objects. E.g., *United States* v. *Crosby*, 294 F. 2d 928, 942 (C.A. 2, 1961). Applying this test here, it follows that no account can be taken of the mass of co-conspirators' hearsay in this record until it is first determined, by proof *aliunde*, that Tropiano became a member of the conspiracy, that he undertook a "stake in the venture". *United States* v. *Cianchetti*, 315 F. 2d 584 (C.A. 2, 1963).

We have not found express judicial language that the hearsay rule, or the restrictions hedging the exception

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* Nor is there any doubt that the question is properly preserved on the present record, at least there is no such doubt if we are correct in our above suggestion that sufficiency of the evidence is always *intrinsically* an issue of fair due process trial in a criminal case. In Tropiano's brief in the Court below (pp. 3, 8-18), his first two points of argument were addressed to the sufficiency of the evidence, with exhaustive references to the trial record.

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for con-conspirators' hearsay, are rooted in constitutional due process. But the contrary conclusion does not seem possible, in view of the familiar reasons of policy against hearsay evidence generally, reasons which connote in the strongest way the sense that when hearsay is excluded it is because the party who would be adversely affected by admission of the hearsay would be subjected to an unfair deprivation of opportunity to challenge the evidence by the tests of *ordinary judicial proof.* E.g., *McCormick On Evidence,* 1954 Ed., §224. Cf. *Wong Sun* v. *United States,* 371 U.S. 471, 490-491, declaring, with respect to co-conspirators' hearsay particularly, that "• • • the rule which regulates the use of out-of-Court statements is one of *admissibility,* rather than simply of weight, of the evidence" (emphasis supplied); and that, "We have consistently refused to broaden that very narrow exception to the traditional hearsay rule which admits statements of a co-defendant made in furtherance of a conspiracy or joint undertaking."

Furthermore, since *Pointer* v. *Texas,* 380 U.S. 400, and *Douglas* v. *Alabama,* 380 U.S. 415, and *Bruton* v. *United States,* 391 U.S. 123, the at least implicit due process connotations of the restraints on the co-conspirators' hearsay exception may be viewed as having gained further constitutional-doctrinal alliance from the Sixth Amendment confrontation clause.

These questions of the fairness of the use of the co-conspirators' hearsay in the present case, and of the inadequacy of the prerequisite proof *aliunde* of Tropiano's own adoption of the conspiracy, were argued below by reference to the leading decisions on those subjects by this Court and Federal Courts of Appeals (Brief of the Defendant-Appellant, herein, in the Supreme Court of

Connecticut, pp. 10-18); and the Court below rejected our contentions in §§I and IV of its opinion (appendix hereto, *infra*). To the extent, if any, that our presentation on these points in the Court below may be thought to have been less explicit in preserving the federal constitutional formulation than we are doing in this petition, we respectfully invoke the principle noted by Mr. Justice Douglas in *United States* v. *O'Brien*, 391 U.S. 367, 389-391 (dissenting op.), that "The rule that this Court will not consider issues not raised by the parties is not inflexible and yields in 'exceptional cases' • • • to the need correctly to decide the case before the court" (citing authorities). If thought necesary to invoke this "exceptional cases" principle here, we urge that the present case is "exceptional" for all of the above reasons—and for the additional reasons *infra*—indicating a miscarriage of due process justice.

II. The acts and declarations of the police officers Reynolds and Ahearn outside the presence of Tropiano, which were unconstitutionally received in evidence.

We would respectfully ask the Court to take the time carefully to examine the transcripts of the several Reynolds-DiBella telephone conversations in which, we contend, Reynolds effectively gave birth to or created taped "evidence" against Tropiano that turned out to be extremely prejudicial (DA 27a-83a). For similar "testimony" from Sergeant Ahearn see the Trial Minutes at pp. 781 *et seq.*; DA 11a-12a; SA 31a-34a.

In Tropiano's brief in the Court below his attorneys cited especially *United States* v. *Morello*, 250 F. 2d 631 (C.A. 2, 1957), where the Court said, "• • • No case has

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been cited to us which has ever so applied the conspiracy rule as to allow introduction of words or deeds *of* a government agent *to* an alleged co-conspirator out of the presence of the defendants. * * *". And see pp. 27-32 of Tropiano's brief in the Court below for his full argument on this point. The Court below rejected this argument in § III of its opinion (appendix hereto, *infra*), on the ground that Reynolds' "portion of the conversation was admissible for the limited purpose of giving meaning and coherence to DiBella's statements". This overlooks the whole thrust of Tropiano's argument below—and here—that Reynolds was deliberately contriving and creating inadmissible conversation with DiBella to smear and to enmesh Tropiano, without any justification in any actual *proved* acts or words of Tropiano himself. In the two concluding paragraphs of § III of the opinion below (appendix hereto, *infra*) the Court defends the trial Court's cautionary instructions to the jury concerning this conduct of Reynolds. Merely to read these two paragraphs of the opinion below is to be repelled at once by their lameness of reasoning and language; and to compare them with the actual words of the trial Court's instructions to the jury is decisively instructive, we submit (Trial Minutes pp. 975-1014).

The unfairness—the sheer due process unfairness—of letting the jury hear how Reynolds kept milking DiBella into inflammatorily prejudicial statements about Tropiano, is in itself a sufficient reason for granting certiorari in this case.

(Tropiano's Request to Charge No. 20, denied by the trial Court (Trial Minutes p. 1015) read: "The acts and declarations of Reynolds and Ahearn, outside the presence of this defendant, are not evidence against him".)

III. The use of an information instead of a Grand Jury indictment, and the undisputedly unconstitutional arrest procedure.

In presenting for certiorari consideration the grouping of issues embraced under the above heading we wish to make clear the analytical structure of this grouping:

The process of arresting an individual is, in its nature, an assertion of the power of Government over him, on a charge that he has violated a law of the Government. Once he is thus placed in a state of "arrest", the Government may—depending on circumstances—have the right or power to restrain his physical liberty, or to search him, *or to treat him as henceforth subject to its further processes looking to courtroom prosecution.* Always, however, "arrest" must be on "probable cause", and almost always on a judicial warrant issued on probable cause.

When the arrest status is created by the Government with a view to rendering the arrested individual subject to further prosecutive process in a Court for the offense that gave rise to the arrest, this usually comes about through some form of notice or summons to the individual apprising him that he has been duly, formally accused, by a complaint, or information, or indictment. And when the indictment process is involved, being a process on the *oath* of the grand jurors, the arrest warrant (which may be a bench warrant) is deemed *eo ipse* to be based on "probable cause". Likewise, usually, when the arrest is on a "complaint" the arrest process rests on *sworn* "probable cause", as such "complaint" is customarily made on sworn averments before a judicial magistrate. And customarily also, we may take it, arrest process based on a prosecutor's "information", is preceded by some sworn averment of probable cause before a judicial magistrate.

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These matters of arrest procedure are so familiar that one may tend to lose sight of the constitutional rules involved. There are two such constitutional rules operative here. One, the more familiar one, is that the arrest, as above said, must be on judicially sworn averments of probable cause. The second constitutional rule here involved tends to come much less frequently to one's attention. It is the rule that *a Court,* for purposes of bringing an individual under the power of the Court's judicial processes (for criminal prosecution or for civil-litigation answerability), is no more empowered to "arrest" an individual—or to order him arrested, as by a bench warrant—than is a police officer or a private citizen, except upon "probable cause"; which is to say, that a Court is powerless to obtain *jurisdiction of the person* except in compliance with applicable constitutional requirements. In civil cases this applicable constitutional requirement for jurisdiction of the person is the due process clause. In criminal cases the applicable constitutional requirement is ordinarily considered to be the probable cause requirement of the Federal or State Constitution.

But, ultimately, is not the problem of jurisdiction of the person, in a criminal case, just as much a matter of due process of law (indeed more so), as in a civil case?

Putting it in another way, does not the arrest-probable cause feature in a criminal case, when the purpose of the arrest is to bring the individual within the Court's jurisdiction of the person for the purposes of a criminal prosecution, necessarily equate with and subsume the due process feature of jurisdiction over the person?

The foregoing states the opening stage of the analysis which we are here proposing: Did the Connecticut Courts in this case ever constitutionally obtain jurisdiction of

the person of Ralph Tropiano for the purposes of this prosecution? If they did not, is not all of the prospective-judicial process which the Connecticut Courts have visited upon Tropiano in this case, a total constitutional nullity by analogy to *Pennoyer* v. *Neff*, 95 U.S. (5 Otto) 714, for sheer due process failure of jurisdiction of his person?

However, there is a further—albeit analytically anterior—stage of this inquiry. The State of Connecticut asserted its court-accusatorial power over Tropiano in this case by an "Information" of the State Attorney. This "Information" was unsworn by anyone, as is apparently permitted under the Connecticut statutes (*infra*). Then, a bench warrant was issued for Tropiano's arerst, declaredly based, solely, on the "Information" (R. 4-5); and Tropiano was arrested *via* this bench warrant.

Thus, focusing our attention further for the moment only on the arrest process in this case and on the procedural means by which Tropiano was ostensibly brought within the "jurisdiction of the person" by the Connecticut Courts, we see that he was never brought within that "jurisdicton of the person" on any *sworn* averment of probable cause.

The question therefore becomes—we concede—was Tropiano brought within the Connecticut Courts' jurisdiction of the person by *due process* even though that "process" did not include constitutional compliance in point of probable cause? When we say "we concede" that this due process question *may* stand independent of the probable cause question, we mean that the question has here become: May a State use an unsworn State-Attorney or District-Attorney "Information" procedure, rather than a grand jury oath-supported Indictment procedure, as the basis of an arrest warrant (here a "bench warrant") to bring the accused individual within the State

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Courts'-jurisdiction of the person for purposes of court-room criminal prosecution (here on a charge of felony, moreover)?

In our last preceding three paragraphs we have dealt with a second stage of the within analysis, in which the significance of the use of the unsworn "Information" procedure lies in its relations with the subsequent arrest procedure (arrest to achieve the State Courts' jurisdiction of Tropiano's person). There remains a third analytical stage:

What of the whole basic constitutional problem, as such, of letting States (or the Federal Government, for that matter) use prosecutors' "Informations" in lieu of grand jury Indictments. We shall return to this suggested third stage of the analysis after the following additional intermediate remarks.

We do not know how common, in the State or Federal jurisdictions in this country, is the practice of initiating criminal prosecutions by *unsworn* prosecutors' Informations; nor do we know how common is the adjunct arrest process (by bench warrant or otherwise) based on such unsworn Informations. We do know that this occurred in the present Connecticut State case. We suggest that such procedure of unsworn Informations, at least when the procedure results in arrests which are thenceforth claimed to have established judicial jurisdiction of the person, raises a fundamental question of federal constitutional law under the Fourth, Fifth and Fourteenth Amendments which, so far as we know has thus far not received prominent judicial attention, but which deserves this Court's attention as a matter going to the most fundamental aspects of the constitutional principles of arrest and of due process control over judicial assertion of jurisdiction over the person of an individual in a criminal case.

The Connecticut State Courts seem to have taken it for granted in a series of recent cases—including this case*—that the constitutional defects of arrest process illustrated by the present case do raise an issue of jurisdiction of the person. (As mentioned in our last preceding footnote, the Court below in our present case found a "waiver" by Tropiano in this regard, a topic which we discuss *infra*.)

We therefore respectfully urge this Court to grant certiorari here on the ground, without more, that on the present record there has emerged a constitutional issue of historic dimension, and apparently novel, with respect to the permissibility of arrest procedures (State or Federal) whose design or claim is to establish *judicial* jurisdiction of the person for purpose of criminal prosecution, in the absence of any sworn averment of probable cause. We repeat, this issue combines Fourth Amendment and due process standards.**

Factually, it is undisputed in this case that the Tropiano arrest herein on February 20, 1964—which is the only claimed arrest process that gave the Connecticut

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* See §VII in the opinion below (appendix hereto, *infra*) where it is apparently taken for granted that, under recent decisions of the Supreme Court of Connecticut, the constitutional defects of arrest process illustrated by the present case do raise an issue of jurisdiction of the person, but where the Court (in our present case) finds a "waiver" by Tropiano; we discuss *infra* this supposed "waiver".

** It is hardly necessary to cite authority for the proposition that the Fourth Amendment applies to arrest warrants as well as to search warrants. *Giordenello* v. *United States*, 357 U. S. 480, 485; *Aguilar* v. *Texas*, 378 U. S. 108, 112 n.3; *Beck* v. *Ohio*, 379 U. S. 89, 96 n.6; *State* v. *Licari*, 153 Conn. 127, 214 A. 2d 900, 902 (S. Ct. Err. 1965).

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Courts ostensible jurisdiction of the person over Tropiano for the purposes of this prosecution—was unsupported by any sworn averments of probable cause. DA 13a; R.25-27; Motion Transcript of September 21, 1965, *passim*.* The point was fully argued in the Courts below and denied by them (Brief Of The Defendant-Appellant, Supreme Court of Connecticut, pp. 46-50; §VII of the opinion below, appendix hereto *infra*). Apparently the sole ground for rejection of the point by the Court below was that Tropiano had "waived" by entering his plea of not guilty and then letting more than a year elapse before specifically raising the point in the trial Court, just before the jury trial started (§VII, *id, supra*). This finding of "waiver" is inconsistent with *State* v. *Licari, supra*. Moreover, the point being *jurisdictional*, and of fundamental due process cognizance, alleged waiver is presumptively precluded, or at least not lightly to be presumed.

Returning now to our above suggested "third stage" of this analysis of the Information-arrest phase, it becomes necessary to ask this Court to consider the present viability *or at least the instant applicability* of *Hurtado* v. *California*, 110 U. S. 516, which held (in 1884) that the Fourteenth Amendment due process clause does not require the State to prosecute criminal cases on grand jury Indictments.

(We have quoted *supra*, under our "Statutes" heading, the Connecticut statutory and constitutional provisions which allow criminal prosecution by Information instead of grand jury Indictments except in capital cases and cases of life imprisonment.)

In *Kennedy* v. *Walker*, 337 U. S. 901, the Court affirmed *per curiam*, by a vote of five to four, a judgment

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* The Motion Transcript of September 21, 1965 is one of the items which we are lodging with the Clerk of this Court in facsimile (uncertified) form.

of the Supreme Court of Errors of Connecticut which had approved the State and Federal constitutionality of this Information procedure. This Court's *per curiam* affirmance cited *Hurtado*. Messrs. Justices Black, Douglas, Murphy and Rutledge dissented. Cf. *Beck* v. *Washington*, 369 U. S. 541, 104 *et seq.*, treating *Hurtado* as having continuing viability. We are aware also that the Court denied certiorari in *Gyuro* v. *Connecticut*, 156 Conn. 391, 242 A. 2d 734, cert. denied 393 U. S. 937, where the same Connecticut Information procedure was challenged. See also *Smith* v. *Warden*, 381 U. S. 411.

However, not only the dissent of the four Justices in *Kennedy* v. *Walker*, *supra*, but the entire recent course of decisions on the merits in this Court on various questions of the applicability of provisions of the Federal Bill of Rights to the States through the Fourteenth Amendment, encourage us to raise anew at this time, on behalf of petitioner Tropiano the above suggested questions concerning the *Hurtado-Kennedy* rule. Probably most notable, for present purposes, among the recent Bill Of Rights-Fourteenth Amendment decisions are *Bloom* v. *Illinois*, 391 U. S. 194, making the federal jury trial requirements applicable to State prosecutions for the more severe types of criminal contempt; and *Duncan* v. *Louisiana*, 391 U. S. 145, making the Sixth Amendment jury trial requirement applicable to State criminal cases in general.

See also *Malloy* v. *Hogan*, 378 U. S. 1, 4n.2, cataloguing *Hurtado* among instances in which Justices of this Court have deemed the Fourteenth Amendment to incorporate the Federal Bill Of Rights.

We mentioned above that as an alternative to overruling *Hurtado*, that case might be held inapplicable here. A re-reading of *Hurtado* yields the extremely interesting point that the California statute there involved—dispensing with the need for grand jury indictment—contained

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detailed protective fair-process requirements, as described in this Court's opinion at 28 L. Ed. 232-233, as follows:

> "The Constitution of the State of California adopted in 1879, in article I., section 8, provides as follows:
>
> 'Offenses heretofore required to be prosecuted by indictment shall be prosecuted by information *after examination* and commitment *by a magistrate,* or by indictment *with or without such examination* and commitment, *as may be prescribed by law.* A grand jury shall be drawn and summoned at least once a year in each county.'
>
> Various provisions of the Penal Code regulate proceedings before the examining and committing magistrate in cases of persons arrested and brought before them upon charges of having committed public offenses. These require among other things, that *the testimony of the witnesses shall be reduced to writing in the form of depositions;* and section 872 declares that if it appears *from the examination* that a public offense has been committed, and there is sufficient cause to believe the defendant guilty thereof, *the magistrate must indorse on the depositions an order, signed by him, to that effect,* describing the general nature of the offense committed, and ordering that the defendant be held to answer thereto. Section 809 of the Penal Code is as follows:
>
> 'When a defendant has been examined and committed, as provided in section 872 of this Code, it shall be the duty of the district attorney, withinthirty days thereafter, to file in the superior court of the county in which the offense is triable, an information charging the defendant with such offense. The information shall be in the

name of the people of the State of California, and subscribed by the district attorney, and shall be in form like an indictment for the same offense.'

In pursuance of the foregoing provision of the Constitution, and of the several sections of the Penal Code of California, the District Attorney of Sacramento County, on the 20th day of February, 1882, made and filed an information against the plaintiff in error, charging him with the crime of murder in the killing of one Jose Antonio Stuardo." (Emphasis supplied)

A glance at the within Connecticut statutes which we have quoted *supra,* reveals that thereis nothing in those statutes even remotely resembling the careful provisions in the above quoted *Hurtado*-California statutes and constitutional provisions whereby *a formal judicial record* must precede and must be preserved as a prerequisite to the use of the *Hurtado*-approved California Information procedure. This difference between the California-*Hurtado* provisions and the within Connecticut provisions can readily be treated as decisive by this Court in the present case, we submit, as a ground for holding that *Hurtado* is inapplicable to this case.

Obviously, there is all the difference in the world between an Information (in lieu of grand jury indictment) procedure which goes on a sworn judicial record (as in the California-*Hurtado* situation) on one hand, and an Information procedure which goes on the sheer unsworn *ipse dixit* of a State Attorney, as in the instant Connecticut procedure. This difference becomes of obvious and crucial importance not only in regard to the solemnities of the criminal-accusatory procedure with its dire conferments of power on mere public officers and its even more dire impingements upon the citizenry; this differ-

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ence (between a procedure like the California-*Hurtado* procedure and the instant Connecticut procedure) has gained new importance in recent times in this country because of the advances—which this Court has pioneered—in requiring due process disclosure of grand jury minutes and of other potentionally exculpatory records in aid of criminal defendants.

We do not know whether any previous litigant before this Court (or before other Courts) has called attention to the above described peculiarly protective provisions of the California-*Hurtado* legislative and constitutional provisions. We respectfully call attention to them now, on behalf of our petitionr Tropiano. And we ask this Court, again, to consider that, if it be disinclined to re-examine *Hurtado* with a view to overruling that case, it would be an act of real creative judicial scholarship for this Court to examine into our above suggested distinguishing bases for holding that in any event *Hurtado* is not necessarily applicable here, where the Connecticut State statutes involved leave everything to the plenary and unsworn *ipse dixit* of the passing parade of political personages who may from time to time occupy the jobs of State Attorney or Assistant State Attorney in the State of Connecticut.

Especially compelling, we think, is our above suggested argument, in a case like the present one where, as we earlier herein ventured to intimate, the contemporaneous temptations towards demagogically unprincipled criminal law enforcement against persons of special social odium raise a threat against the entire future health of the Pub-Morality of this country.

We unhesitatingly acknowledge that the above line of argument addressed to the *Hurtado* rule was not raised

in the Courts below on behalf of Tropiano. (The arrest-jurisdiction-of-the-person theme was preserved, as above noted.) But it is no wonder that our esteemed colleagues, Tropiano's Connecticut State counsel, did not raise this point in the Courts below. It would have been worse than useless for them to do so, in view of the unyielding position of the Connecticut Supreme Court on this point as recently as the *Gyuro* case, *supra,* which was decided by that Court in April 1968. In such circumstances we must again refer to Mr. Justice Douglas' dissent in *United States* v. *O'Brien,* 391 U. S. 367, 389-391, collecting the authorities for this Court's flexible power to consider issues not raised by the parties in "exceptional cases".

IV. Electronic Eavesdrop Issues

During the trial of this case defense counsel repeatedly objected to the admission in evidence of the tape recordings on federal Fourth Amendment grounds and on the grounds of the Federal Communications Act (47 U.S.C. §605) (Trial Minutes, pp. 339-341, 358-359, 399, 421). The point was not raised, however, on appeal in the Court below—until the filing of Tropiano's "Addendum To And Amplification Of Motion To Re-argue" (See Certified Record).

The latter "Addendum" referred to the presently pending case in this Court of *United States* v. *White,* No. 46, this Term, as possibly portending a ruling by this Court that one-party-consent electronic monitoring is unconstitutional.

The electronic monitoring in this case consisted of one minifon-type recordation by Detective Reynolds of a conversation he had with the co-conspirator Guglielmo; several tapes of telephone conversations between Reynolds and the co-conspirator DiBella which Reynolds recorded

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at his own telephone; and one tape of a telephone conversation he had with the co-conspirator Guglielmo; sev- these items were extraordinarily prejudicial to Tropiano, as previously noted.

We respectfully ask that disposition of this electronic-monitoring issue in our case be given the benefit of any possibly favorable ultimate determination which this Court may reach in the presently pending case of *United States* v. *White, supra.*

V. Remaining certiorari points preserved in the event of the granting of certiorari.

In the event of the granting of certiorari herein we respectfully preserve our Questions Presented No's 5, 6 and 7.

CONCLUSION

It is respectfully submitted that this petition for a writ of certiorari to be granted.

F. Lee Bailey,
Abraham Glasser,
Raymond J. Daniels,

Attorneys for Petitioner
Ralph Tripiano.

APPENDIX

Opinion of Supreme Court of Connecticut

[Order Denying Motion for Reargument Entered October 29, 1969]

DATE OF SUPREME COURT JUDGMENT	DECISION ANNOUNCED
SEP 24 1969	OCT 7 1969

SUPREME COURT

May Term, 1969

STATE OF CONNECTICUT *v.* RALPH TROPIANO

Information charging the defendant and others with the crime of conspiracy, brought to the Superior Court in New Haven County and tried to the jury before *Meyers, J.;* verdict and judgment of guilty and appeal by the defendant. *No error.*

Ira B. Grudberg, with whom, on the brief, was *Howard A. Jacobs,* for the appellant (defendant).

David B. Salzman, assistant state's attorney, with whom, on the brief, were *Arnold Markle,* state's attorney, and *Richard P. Sperandeo,* assistant state's attorney, for the appellee (state).

ALCORN, J. The defendant was convicted by a jury of the crime of conspiracy in violation of General Statutes § 54-197 and has appealed from the

judgment rendered on the verdict and from the denial of his motions to set aside the verdict and for judgment in accordance with his motion for a directed verdict. The information on which he was tried alleged, in substance, that between September 1, 1963, and February 20, 1964, he conspired with Anthony F. DiBella, Pasquale Guglielmo, Alfred J. Amaio and Paul Licari to offer money to police officers to secure protection for illegal gambling and liquor activities. We have previously sustained the conviction of DiBella and Amaio for their part in the same conspiracy, the nature of which has been summarized in the opinion in that case. *State* v. *DiBella,* 157 Conn. 330, 254 A.2d 477. We shall confine our factual recital in the present case to matters pertinent to the defendant's participation in the conspiracy and the various errors assigned in the proceedings which terminated in the verdict of the jury.

Among the thirty-five assignments of error are thirteen which attack findings made by the court. In passing upon the latter we are confronted with a variety of errors assigned in five distinct findings. In advance of the trial to the jury, the defendant made a motion to suppress evidence, a motion to dismiss or quash the information, a motion to quash or strike the amended information, and a motion to sequester witnesses. In disposing of each of these motions, the court, sitting without a jury, made separate findings of fact which can be corrected only as provided in Practice Book § 628. Following the appeal, the court made a finding as required by Practice Book § 635 which can be cor-

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rected as provided in § 628 so far as that section is applicable. Practice Book § 636. This requires consideration of whether the finding relating to the jury trial includes the material facts concerning which "there was evidence upon the basis of which the jury could reasonably find a certain fact proven, and the appellant claimed to have proved it." Maltbie, Conn. App. Proc. § 160, p. 198. We have examined the assignments of error addressed to the five separate findings in the light of these principles and conclude that no corrections material to our decision are required.

The remaining assignments of error are prolix and confusing. By a repetitious admixture of attacks on rulings on evidence, on the charge of the court and on rulings on various motions, the defendant claims essentially, as set forth in his brief, that the court erred in refusing to direct a verdict of not guilty; that there was a fatal variance between the information and the proof; that the court erred in failing to charge the jury that acts and statements of witnesses not made in the presence of the defendant could not be used against him; that the court erred in admitting hearsay declarations of coconspirators, in limiting cross-examination of state's witnesses, in denying the defendant's motion to sequester witnesses, and in refusing to charge as requested; and that the defendant was illegally arrested on a warrant issued without probable cause supported by oath or affirmation.

I

After the state and the defense had rested, the defendant moved for a directed verdict on the ground that the evidence was insufficient to prove

the defendant's guilt beyond a reasonable doubt. The court denied the motion, and that denial is assigned as error. After the jury had returned a verdict of guilty, the defendant moved to set aside the verdict and for judgment in accordance with his motion for a directed verdict. This motion also was denied, and that denial is assigned as error.

The correctness of the court's ruling on each motion must be tested by the evidence printed in the appendices to the briefs. *State* v. *Mortoro*, 157 Conn. 392, 393, 254 A.2d 574; *State* v. *Gyuro*, 156 Conn. 391, 397, 242 A.2d 734, cert. denied, 393 U.S. 937, 89 S. Ct. 301, 21 L. Ed. 2d 274. It was the state's burden to prove that the defendant did some act which actually was in furtherance of the purposes of the general conspiracy and that, when he did it, he had a guilty intent and knew that what he was doing was a part of a general scheme to commit some of the unlawful acts alleged in the information. *State* v. *Hayes*, 127 Conn. 543, 563, 18 A.2d 895.

From the evidence before them the jury could reasonably have concluded that a gambling operation, involving men from New Haven, had been in the planning stage for about a year prior to September 17, 1963. On that date, Guglielmo approached Francis Reynolds, a detective in the West Hartford police department, with an offer of between $10,000 and $12,000 for police protection of the operation. Thereafter DiBella entered the picture, and extensive discussion followed for a considerable period of time with the objective of arranging for protection of illegal operations in New Haven as well as in West Hartford by enlisting the aid of Stephen P. Ahern, a sergeant in the New Haven police department. On January 30, 1964, DiBella informed Rey-

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nolds that the payoffs would be made from the defendant, who was the "top man", to DiBella, to Reynolds and from him to Ahern. After discussing the division of the payments, DiBella went to a telephone and on his return said: "Come on, we are going to New Haven." Reynolds and DiBella then drove to a restaurant in New Haven where they met Licari and the defendant, and DiBella introduced Reynolds as the man he had been "talking about the deal with." Licari and DiBella then left Reynolds and the defendant alone in a booth at the restaurant, and the defendant told Reynolds: "The only thing I want from Ahern are the crap games. Horses can come later."

Reynolds asked the defendant how much Ahern was to get, and the defendant said: "Quote a figure." Reynolds quoted $475 to $500 a week, and the defendant voiced approval of the amount suggested. The defendant said that he wanted the crap games operated every night of the week otherwise they would "get cold and the people would go to Bridgeport." Following this conversation, Licari and DiBella returned to the booth, and, after discussion concerning Licari, who was going to run the crap games, DiBella and Reynolds went home.

From the evidence recited the jury could properly conclude that the defendant's own conduct clearly identified him as an active participant in an illegal conspiracy. *State* v. *Hayes*, supra. The court did not err in refusing to direct a verdict of not guilty or in denying the motion to set aside the verdict.

At the conclusion of the evidence, the defendant moved to strike certain of the testimony of Guglielmo, Reynolds and Ahern because the state had

not offered independent evidence of the conspiracy and the defendant's connection with it sufficient to make the testimony admissible. Recitation of further facts is unnecessary since it is apparent that the court did not err in denying the motion.

II

The claim made in the brief that the proof at the trial was at fatal variance with the information is not specifically assigned as error and consequently is not properly raised. Practice Book § 651. Argument on the point insinuates itself into the case through the errors assigned in the denial of the motions to direct and to set aside the verdict, and through an assignment that the court erred in refusing eleven requests to charge, four of which related to the distinction to be drawn between a single conspiracy and several conspiracies. The purport of the argument is that the court should have charged that the state was required to prove a single conspiracy in order to convict the defendant and that a conviction could not be had if the jury concluded that the several defendants engaged in separate conspiracies even though one conspirator engaged in all of them.

The amended information charged the defendant with conspiring with the other named persons to offer money to police officers to influence their conduct so that illegal gambling and liquor operations could be conducted in Hartford, New Haven and other counties and specified ten overt acts in furtherance of that conspiracy. The finding is that the state offered evidence to prove and claimed to have proved nine of the overt acts alleged. The de-

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fendant does not contend otherwise but asserts that the state's claims of proof established five separate conspiracies. In an endeavor to support this claim, the defendant utilizes overt acts which, in actuality, are individual facets of the single conspiracy charged.

The defendant makes no claim that he offered to prove, or proved, multiple conspiracies. Instead, he contends that "based upon the State's evidence" the court committed error in refusing his requests to charge concerning the state's burden of proving the single conspiracy alleged. We have examined the charge on this phase of the case and conclude that it was adapted to the issues and adequate for the guidance of the jury. *Berniere* v. *Kripps*, 157 Conn. 356, 358, 254 A.2d 496; *Lopes* v. *Connecticut Light & Power Co.*, 145 Conn. 313, 315, 142 A.2d 135.

III

Detective Reynolds had immediately reported to his superiors at police headquarters the proposition made to him on September 17, 1963, by Guglielmo. Thereafter, meetings which he had with the conspirators were under the surveillance of the West Hartford police, and tape recordings were made of telephone conversations which he had with DiBella. These recordings and the stenographic transcriptions made of them were introduced into evidence. When they were introduced, counsel for the defendant requested the court to charge the jury that Reynolds' parts of the conversations were not binding on the defendant because Reynolds was not a cocon-

spirator and had said nothing in such a capacity. Counsel for the defendant also filed a written request to charge that "[t]he acts and declarations of Reynolds and Ahern, outside the presence of this defendant, are not evidence against him."

The substance of the conversations concerned the defendant's role in the conspiracy, and the defendant concedes that the court did not err in receiving the recordings and transcripts in evidence.

Although Reynolds' part in the conversations was not admissible to prove the truth of any assertions made by him, since he admittedly was not a coconspirator, nevertheless his portion of the conversation was admissible for the limited purpose of giving meaning and coherence to DiBella's statements. See *United States* v. *Morello*, 250 F.2d 631, 634 (2d Cir.); 7 Wigmore, Evidence (3d Ed.) §§ 2097, 2099. The admission of the entire conversation tended to eliminate the possibility that the jury would interpret the meaning of DiBella's statements out of context rather than to prejudice the defendant.

Cautionary instructions concerning the effect which the jury should give to statements made by DiBella as distinguished from those made by Reynolds were called for, however. *United States* v. *Morello*, supra. Nevertheless, the court was not required to adopt the exact language of the defendant's request so long as it gave the jury a clear understanding of the issue and a proper guidance in determining it. *State* v. *Alterio*, 154 Conn. 23, 27, 220 A.2d 451, and cases cited.

An examination of the charge discloses that the court told the jury specifically that the information charged the defendant with conspiring with Gug-

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lielmo, DiBella and Amaio, to the exclusion of the police officers and Licari. The court explained that Licari had been tried and acquitted of conspiracy previously and that the state claimed that the officers took money only as evidence of the conspiracy alleged. The jury were told that acts or declarations of a coconspirator did not involve the defendant until he had been proved to be a member of the conspiracy by other evidence but that once he had been proved to be a member of the conspiracy the declarations of a coconspirator in furtherance of the conspiracy were admissible against him.

It was thus made clear to the jury, by specific identification, who the conspirators were alleged to be. Not only were the officers excluded from that category but the charge abundantly emphasized to the jury that the part which the officers played in the scheme of things was to bring the conspirators to justice. The charge of the court adequately alerted the jury to the fact that only the acts and declarations of coconspirators in furtherance of the conspiracy could be used against the defendant. This statement necessarily excluded the acts and declarations of the officers, and this was the substance of the defendant's request to charge. *United States* v. *Morello*, supra.

IV

The defendant assigns error in rulings of the court in admitting into evidence statements made by coconspirators.

Reynolds testified to a conversation with Guglielmo in which Guglielmo said that the deal was still on. Reynolds asked him if he was serious, and Guglielmo said, "You don't think I would be kidding

about something like this?" After a discussion about the money involved and the division of it, Reynolds asked if Guglielmo had had any further meetings in New Haven, and he said, "No. I don't want to be seen with that type of crowd." As the answer continued, the defendant's counsel objected that it was narrative and not within the coconspirators exception, but the court allowed the answer to be completed.

Included in the recordings of telephone conversations, and the stenographic transcriptions thereof already referred to, were statements made by DiBella in a conversation with Reynolds in which DiBella said, "Well, you see, Whitey [meaning Tropiano]—nobody is ever gonna catch him. Whitey is got operations going that he ain't got no part of himself and they're running because no matter how many times they catch his men his men are—they'll die." DiBella also said, "—you can never tell whether its part of his [Tropiano's] operation. But, without him the town don't run." The defendant's counsel objected to both statements on the ground that they constituted narrative and were not in furtherance of the conspiracy, and the court overruled the objection.

Included in the recordings and the stenographic transcriptions was a statement by DiBella to Reynolds, "That's right. He'll—he'll honor Mr. Ahern in his own particular way—it'll be a crude way—he'll say 'I don't know—you know what he wants, he's waiting for me to get myself off guard, but he ain't gonna catch me.'" The defendant's counsel objected on the ground that the statement constituted speculation on DiBella's part and was his

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interpretation of the operation of someone else's mind, and the court overruled the objection.

The defendant now argues that the statements quoted were not made in furtherance of the conspiracy and so were not admissible under the so-called coconspirators exception to the hearsay rule. The rule that any declaration made by a coconspirator, pursuant to the common object of the conspiracy and in furtherance of it, is admissible against all of the conspirators once the combination is established was enunciated by this court over one hundred years ago in *Cowles* v. *Coe*, 21 Conn. 220, 234. In more recent times, the requirement that the declaration be in furtherance of the conspiracy has been the subject of discussion. Professor Edmund M. Morgan in "The Rationale of Vicarious Admissions," 42 Harv. L. Rev. 461, has urged that that requirement of the rule be eliminated since the trustworthiness of the declaration is guaranteed by the circumstance that (p. 481) "the fact stated is consciously against the interest of the declarant." See also Model Code of Evidence rule 508 (b); Uniform Rule of Evidence 63 (9) (b), 9A U.L.A.; Levie, "Hearsay and Conspiracy, A Reexamination of the Co-Conspirators' Exception to the Hearsay Rule," 52 Mich. L. Rev. 1159, 1167; note, "Developments in the Law [of] Criminal Conspiracy," 72 Harv. L. Rev. 920, 985.

The defendant relies heavily on *Krulewitch* v. *United States*, 336 U.S. 440, 69 S. Ct. 716, 93 L. Ed. 790, in which the court appears to reject Professor Morgan's suggestion, although the conversation involved in that case took place after the conspiracy had ended and concerned an anticipated criminal prosecution. Any detailed discussion of the sound-

ness of the portion of the rule which requires statements of coconspirators to be "in furtherance of the conspiracy" is, however, unnecessary in the present case. In the first place, the statements objected to were clearly made during the pendency of the conspiracy, and the defendant does not contend otherwise. Furthermore, even though the statements, in part, may be interpreted to refer to past facts, they were part and parcel of the discussions concerning the bribe payments and were obviously made for the purpose of reassuring Reynolds of the soundness and prospective completion of the proposition made to him. Any references to past facts were natural and pertinent to the conspiracy and were therefore in furtherance of it. *United States* v. *Pardo-Bolland*, 348 F.2d 316, 324 (2d Cir.), cert. denied, 382 U.S. 944, 86 S. Ct. 388, 15 L. Ed. 2d 353; *United States* v. *Annunziato*, 293 F.2d 373, 380 (2d Cir.), cert. denied, 368 U.S. 919, 82 S. Ct. 240, 7 L. Ed. 2d 134. The statements which are claimed to be speculation and interpretation of the operation of someone else's mind by DiBella were, even if characterized as expressions of opinion, based on DiBella's own personal knowledge. See *Stephanofsky* v. *Hill*, 136 Conn. 379, 382, 71 A.2d 560. Like the other statements they were calculated to reassure Reynolds of the soundness of the proposition made to him. The court did not err in admitting the testimony.

V

The defendant assigns error in rulings of the court during his cross-examination of witnesses for the state.

During cross-examination of Reynolds, the witness stated that his recollection was exhausted. Defense counsel then asked Reynolds when he had last looked at any records, transcript or otherwise, concerning the subject under inquiry, and Reynolds said he could not recall. Defense counsel then asked whether the witness' recollection was refreshed "whenever it was you looked over your notes." The state objected that "[i]t's recollection that's being refreshed at this time, not at some other time," and the court sustained the objection. The ruling was correct. Another ruling improperly conjoined in this assignment requires no discussion.

In cross-examining Guglielmo, defense counsel questioned him concerning a statement which he read from the transcript of a former trial and which was not an exhibit. On objection by the state, the court stopped the reading, stating that counsel could not read from the record "without turning in the record." The defendant now claims that the ruling balked him from showing a prior inconsistent statement of the witness. The defendant does not point to the alleged inconsistency, and the transcript discloses none.

In cross-examining Reynolds concerning the dates of several conversations, the witness said he could not recall but could answer exactly if allowed to look at his notes. Defense counsel did not allow the witness to refresh his recollection from his notes, and the court refused to permit a repetition of questions which the witness had said he could not answer from his present recollection. There was no error in that exercise of the court's discretion.

On direct examination Reynolds had testified that he met Sergeant Ahern when he arrived at a parking lot for a meeting with DiBella on February 13, 1964. In a previous trial he had testified that Ahern drove in after he and DiBella had arrived. This variance in his testimony was pointed out by defense counsel in cross-examination. Defense counsel now makes the footless complaint that the court, after examining a report made by Reynolds to his superiors, which included the details recorded in a memorandum made by him of the meeting of February 13, 1964, both of which had been marked for identification, found no inconsistency in them beyond what was already in evidence and therefore refused to allow further cross-examination on the incident by reference to the documents.

Before the trial of the defendant began, Guglielmo had pleaded guilty to the same crime as that with which the defendant was charged and had received a suspended sentence. At the start of the defendant's trial, the court informed the jury that Guglielmo had pleaded guilty. This was the fact, although that plea was entered after an earlier not guilty plea. On cross-examination, defense counsel asked Guglielmo whether, before trial, he had pleaded not guilty; whether he was sentenced "after the last case was disposed of"; and whether, before the last case started, he had conferred with the state's attorney as to what his testimony would be. The state's objection to each question was sustained. Defense counsel stated as the ground for admissibility: "I am entitled to go into the question of motive for testimony."

The questions were admissible for the purpose of attacking the witness' credibility on the ground of motive, interest, or bias. *State* v. *Luzzi*, 147 Conn. 40, 46, 156 A.2d 505. Subsequent cross-examination indicates that the defendant's apparent objective was to indicate to the jury some motive, bias, or interest in the witness by suggesting that promises of leniency were made to him which were productive of the change of plea and which resulted in the suspended sentence. The rulings of the court excluding the questions for the purpose stated were erroneous. In order to constitute reversible error, however, the rulings must have been both wrong and harmful. *State* v. *Fredericks*, 154 Conn. 68, 72, 221 A.2d 585. If the record discloses that the rulings could not reasonably have affected the verdict, they were not harmful and hence not reversible error. *DeCarufel* v. *Colonial Trust Co.*, 143 Conn. 18, 21, 118 A.2d 798.

Guglielmo's direct testimony, which covers fifty-four pages of the trial transcript, shows that Guglielmo was offered by the state principally to explain Reynolds' connection with the case. His testimony under cross-examination by the defendant, which covers 122 pages of the trial transcript, dealt with his long acquaintance with, and proposal to, Reynolds, his introduction of Reynolds to DiBella, his talks with DiBella and Reynolds regarding Reynolds' proposed activity, and his express denial that he either offered any money to Reynolds or expected to receive or actually received anything from DiBella for approaching Reynolds. His testimony did not tend toward proof of the crime charged, and the verdict need not have been affected even if the jury

chose to discredit his entire testimony. Under those circumstances the rulings complained of were harmless. *DeCarufel* v. *Colonial Trust Co.*, supra.

Beyond that, however, the transcript discloses that cross-examination continued after the objections to the questions in issue were sustained, during which, over objection by the state, and subsequent to the rulings complained of, the defendant was permitted to ask Guglielmo the direct question whether any promises had been made to him, and the witness answered, "There was no promises made." Thereupon, the defendant dropped the subject, made no attempt to test the answer he had received, and continued his cross-examination, confining it to other matters. The defendant does not now claim that any promises were actually made to Guglielmo or that cross-examination to test his express denial of any promise was in any way restricted. Nor did the defendant attempt to question the witness concerning any circumstances surrounding either the pleas or the sentence which would tend to suggest even a hope or expectation of leniency productive of a motive or interest likely to affect Guglielmo's credibility. Our examination of the transcript discloses no curtailment of proper cross-examination which would render the rulings complained of harmful or prejudicial. See cases such as *People* v. *Smith*, 26 Cal. 2d 854, 858, 161 P.2d 941; *People* v. *Miceli*, 101 Cal. App. 2d 643, 647, 226 P.2d 14; *People* v. *Stone*, 89 Cal. App. 2d 853, 860, 202 P.2d 333.

Finally, Guglielmo's position as a self-confessed conspirator testifying for the state furnished a basis upon which the jury could, if it decided to do so, determine that he was a biased or interested witness.

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3 Wigmore, Evidence (3d Ed.) § 967. The court, in effect, so charged, clearly described Guglielmo's status to the jury, and charged them that it required that they carefully scrutinize his testimony. The defendant received apparently free and full answers to his questions regarding Guglielmo's conferences with the state's attorney concerning his testimony. When viewed from every angle the rulings complained of were harmless.

VI

Before the trial to the jury began, the defendant made a motion to sequester witnesses. The court denied the motion, and the denial is assigned as error. The motion, which was in writing, stated, "The defendant Ralph Tropiano moves that the witnesses for the State be sequestered." No reasons were stated. In argument of the motion the defendant claimed that the essence of the state's case involved conversations between Guglielmo and Reynolds, Guglielmo and DiBella, and DiBella, Reynolds and Ahern. The claim was that sequestration of the witnesses was necessary in order to prevent them from unconsciously or consciously shaping their testimony. A similar motion was made and ruled on in *State* v. *DiBella,* 157 Conn. 330, 342, 254 A.2d 477, and the same principles as in that case apply here. Furthermore, in the present case, the court was cognizant of the fact that, as a result of the prior case, the witnesses named could be fully aware of the testimony elicited at that trial to which any coaching in the present case could add little. The court did not err in denying the motion. *State* v. *DiBella,* supra.

VII

The defendant assigns error in the denial of his "motion to dismiss and/or quash" the information on the ground that the bench warrant under authority of which he was arrested was issued without a showing of probable cause supported by oath or affirmation.

At the hearing on the motion which took place prior to the trial, the court found that the defendant was arrested on February 20, 1964, by virtue of a bench warrant issued by a Superior Court judge on that date. Following the procedure which was then customary, the warrant was issued without oath or affirmation on the oral representation by the state's attorney that he had reasonable grounds to believe that the crime charged had been committed within the jurisdiction. Counsel entered a general appearance for the defendant, and, on March 3, 1964, the defendant pleaded not guilty to the charge made against him. The information was later amended, and, on November 17, 1964, the defendant again entered a not guilty plea to the amended information. The motion to dismiss and/or quash the information was not made until September 20, 1965, the day preceding the start of the jury trial. Thus, no question was raised as to the validity of the arrest until nineteen months after issue was joined on the original information by a not guilty plea and ten months after a like plea to the amended information.

In *State* v. *Licari*, 153 Conn. 127, 214 A.2d 900, we said (p. 129) that an attack such as that now made on the court's jurisdiction of the defendant's person is one which should be made before a plea of

guilty or not guilty and (p. 130) that a failure to move in timely fashion is strong evidence of consent to jurisdiction of the person (p. 131) although on the record in that case we could not, as a matter of law, find such consent. In *State* v. *Orsini*, 155 Conn. 367, 379, 232 A.2d 907, we said that the invalidity of the bench warrant was waived by a failure to raise the issue during the lapse of almost a year between the date of the arrest and the date of trial, and we alluded to circumstances indicative of the defendant's cognizance of the existence of the issue. See also *State* v. *Darwin*, 155 Conn. 124, 144, 230 A.2d 573, rev'd on other grounds, 391 U.S. 346, 88 S Ct. 1488, 20 L. Ed. 2d 630.

We have so recently discussed the proper and timely way in which to raise the issue attempted to be raised by the defendant's motion to dismiss that the discussion need not now be repeated. *Reed* v. *Reincke*, 155 Conn. 591, 236 A.2d 909. "Proof of waiver of the illegality of an arrest and consent to the jurisdiction of the person can, and indeed does, in the absence of some mitigating factor not present here, rest on the record of the plea of guilty or not guilty." Id., 601.

The court did not err in denying the motion to "dismiss and/or quash" the information.

VIII

The defendant assigns as error that the court refused eleven written requests to charge. Four of them related to the requirement that the state must prove a single conspiracy. These we have discussed in connection with the claim of variance. One, we have discussed in connection with the introduction into evidence of the tape recordings. Five

others receive only cursory treatment in the defendant's brief, and an examination of the charge discloses that it substantially complied with the requests involved.

The one remaining attack on the charge concerns the subject of the defendant's failure to testify. The defendant filed a written request that the court charge as follows: "The defendant is not required to testify on his own behalf. The law gives him the right not to testify. Here the defendant Ralph Tropiano exercised his right not to testify. I instruct you that you must not consider the defendant's exercise of his right not to testify as evidence of guilt. You may draw no inference of any kind against the defendant because he did not testify." The court charged as follows: "From the fact that a man is presumed to be innocent, the next principle follows; namely, that the burden of proof is upon the State throughout the trial to prove an accused guilty and an accused does not have to prove his innocence. That is to say, it is incumbent upon the State to carry the burden of proving its case in all its essential elements before a verdict of guilty may be rendered. Mr. Ralph Tropiano was under no obligation to go forward with witnesses to defend himself or to take the stand. No presumption, no inference of any kind should be drawn against him because he hasn't undertaken to testify or because he has not called witnesses in his own behalf. The accused had the right to testify if he so elects. He has the right to call witnesses and explained [sic] the case from his standpoint, but no inference of guilt should be drawn against him for the reason alone that he does not elect to exercise either of

those rights; because, as I have said, he is presumed to be innocent and the State has upon it impressed by law the burden of overcoming that presumption and establishing beyond a reasonable doubt every essential element of the crime charged. And, until that is established by evidence beyond a reasonable doubt, the presumption of innocence is not overcome."

At the conclusion of the charge no exception was taken other than to the court's failure to charge as requested. Consequently, the error now assigned raises only the question whether the charge sufficiently covers the subject matter of the request. *McMahon* v. *New York, N.H. & H.R. Co.*, 136 Conn. 372, 375, 71 A.2d 557. "The failure to charge in the exact language of the requests is not error." *Mace* v. *Conde Nast Publications, Inc.*, 155 Conn. 680, 687, 237 A.2d 360.

The defendant now would complain of the court's use of the word "alone" and its failure to tell the jury that the defendant "had the right not to testify." He urges that the implication is that no inference from his failure to testify could be drawn unless it is related to other factors in relation to his silence. Quite aside from the fact that the claim now made was not made the basis of an exception at the conclusion of the charge, the attempt to assert reversible error by culling a single word from the charge must fail unless it is reasonably probable that the jury were misled by it. *Penna* v. *Esposito*, 154 Conn. 212, 215, 224 A.2d 536. Considering the charge on this issue as a whole, as we must, we find no reasonable possibility that the

jury were misled. The charge concerning the defendant's failure to testify was fully adequate for the guidance of the jury. *Michaud* v. *Gagne*, 155 Conn. 406, 412, 232 A.2d 326.

There is no error.

In this opinion the other judges concurred.

Judgment

STATE OF CONNECTICUT

This appeal by the defendant from the judgment of the Superior Court for New Haven County at New Haven was filed with the Clerk of said Court on the 29th day of October, 1965, and said appeal came thence to the 31 day of May, 1967, when the appellant filed his assignment of errors, as may appear in the certified transcript of record on file in this Court, and said appeal came thence to this Court at its term held at Hartford on the first Tuesday of June, 1967, and thence to the present term when the parties appeared and were fully heard.

And now this Court finds there is no error.

Whereupon it is adjudged that said judgment be confirmed and established, and that the appellee recover of the appellant its costs taxed at
Date of Judgment. September 24, 1969.

By the Court,

EDWARD HOROWITZ
Clerk.

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FILED
MAY 25 1970
JOHN F. DAVIS, CLERK

In the

Supreme Court of the United States

OCTOBER TERM, 1969

No. 1364

RALPH TROPIANO,
Petitioner,

vs.

STATE OF CONNECTICUT,
Respondent.

BRIEF OF STATE OF CONNECTICUT IN OPPOSITION TO PETITION FOR CERTIORARI

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THE MACK CO., NORTH HAVEN, CONN.

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QUESTIONS PRESENTED

1. Whether this court should grant certiorari to review the sufficiency of the evidence in a state court criminal conviction.

2. Whether this court should agree to review a claim that is raised for the first time in the history of the case in the present petition. (The claim so raised is that the Fourth, Fifth and Fourteenth Amendments forbid "prosecution by information" and require a grand jury indictment.)

3. Whether certiorari should be granted to review a non-federal claim which was not timely raised below, which was decided in conformity with other Connecticut decisions, and which protests a practice since adandoned in the State.

4. Whether this court should review a ruling which permitted the jury to hear questions posed by police officers to co-conspirators of the defendant.

5. Whether this court should review the extent of cross-examination which was permitted by the trial court.

6. Whether this court should review the facts of this case which prompted the trial court to refrain from charging the jury concerning multiple conspiracies.

7. Whether this court should review the trial court's jury charge regarding certain taped conversations which the defendant conceded were admissible.

STATEMENT OF THE CASE

The defendant was arrested pursuant to a bench warrant dated February 20, 1964. (State R. 5) After the entry of a not guilty plea, and a few other procedural steps, the defendant eventually filed a Motion to Dismiss and/or Strike the Information on September 20, 1965, the day before the trial began. (State R. 17; Def's. App. 18a) The motion sought dismissal of the charges on the ground that, pursuant to the practice prevailing in Connecticut at the time of the issuance of the bench warrant, the warrant was issued upon representations of the State's Attorney rather than upon an oath or affirmation as required by the Connecticut Constitution. (This practice has since been abandoned in Connecticut.)

The Connecticut Supreme Court ruled, in conformity with its prior rulings on the same issue, that by waiting nineteen months, and by having submitted to the jurisdiction by his two not guilty pleas, the defendant had not timely raised the issue; it held that the trial court had not erred in denying the motion. (Def's. App. 18a, 19a)

The jury fairly could have concluded that the defendant was the "top man" in a gambling operation which involved men from both Hartford and New Haven. Initially, Guglielmo appoached Francis Reynolds, a detective in the West Hartford Police Department, for protection for the operation. DiBella and Stephen P. Ahern, a sergeant in the New Haven Police Department, joined the arrangements for protection. Eventually, Reynolds and DiBella met the defendant at a restaurant in New Haven. The opinion below accurately reflects the testimony: ". . . The defendant told Reynolds: 'The only thing I want from Ahern are the crap games. Horses can come later.' Reynolds asked the defendant how much Ahern was to get, and the defendant said, 'Quote a figure.' The defendant said that he wanted the crap games operated every night of the week otherwise they would 'get cold and the people would go to Bridgeport'." (App. 5a; R. 31-45)

Both Detective Reynolds and Sergeant Ahern were operating with the knowledge and approval of their superiors. The defendant was convicted, and sentenced to State Prison for not less than three nor more than six years. (State R. 18)

Other facts will be added in the appropriate places in the argument.

ARGUMENT

I.

THIS COURT SHOULD NOT GRANT CERTIORARI TO REVIEW THE SUFFICIENCY OF THE EVIDENCE IN A STATE COURT CONVICTION.

Although the defendant recognizes in his brief (at p. 22) that this court will not grant certiorari to review the sufficiency of the evidence, he claims it should do so in this case. He advances two reasons. First, because the case presents a "sinister . . . threat to American courtroom justice" (Def's. Brief p. 22) and, second, because this case "borders precipitously" on being a case without evidence. (Def's. Brief p. 24)

There was ample evidence to support the conspiracy conviction in this case, the highlight being this defendant's conversation with the police officer from whom he thought he was purchasing protection for his illegal gambling operation: "The only thing I want from [Sergeant] Ahern are the crap games. Horses can come later." The conversation concluded after a discussion of the amount to be paid and of the frequency with which the crap games were to be held.

The opening paragraph of the decision in *Thompson* vs. *Louisville*, 362 U.S. 199, 4 L. Ed. 2d 660, 80 S. Ct. 619 (1960) reflects this court's consistent position of refusing to review the sufficiency of the evidence. This court does not grant certiorari to review evidence, to discuss specific facts, to review inferences drawn from the evidence, and it will not disturb findings of fact unless they plainly are without support. *NLRB* vs. *Waterman S. S. Corp.*, 309 U.S. 206, 208, 84 L. Ed. 704, 60 S. Ct. 493, 495, *reh. denied* 309 U.S. 696, 84 L. Ed. 1036, 60 S. Ct. 611 (1940); *United States* vs. *Johnston*, 268 U.S. 220, 227,

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69 L. Ed. 925, 45 S. Ct. 496, 497, (1925); *General Talking Pictures Corp.* vs. *Western Electric Co., Inc.*, 304 U.S. 175, 178, 82 L. Ed. 1273, 58 S. Ct. 849, 851 (1938). Because there was ample evidence to support the verdict in this case, certiorari should not be granted to review its sufficiency.

II.

Certiorari Should Not Be Granted To Review The Grand Jury Claim, It Having Been Raised For The First Time Here.

For the first time in the history of this case, the defendant claims that his arrest was faulty because it was not the result of a grand jury indictment. (A related claim that the request for the bench warrant was not supported by an oath or affirmation will be discussed below.) He did not make the claim during the trial nor to the Supreme Court of Connecticut, and the Connecticut Supreme Court did not discuss the issue nor make any decision regarding it. At pages 39-40 of his brief the defendant concedes that he did not raise the issue in the courts below. This court has consistently refused to review an issue raised for the first time on appeal, particularly when the appeal is from a state court decision wherein the state court did not have an opportunity to pass upon the claim. *Beck* vs. *Washington*, 369 U.S. 541, 553, 8 L. Ed. 2d 98, 82 S. Ct. 955, 962, *reh. denied* 370 U.S. 965, 8 L. Ed. 2d 834, 82 S. Ct. 1575 (1962); *Nelson* vs. *Los Angeles*, 362 U.S. 1, 9, 4 L. Ed. 2d 494, 80 S. Ct. 527, 532 (1960); *Adler* vs. *Board of Education*, 342 U.S. 485, 496, 96 L. Ed. 517, 72 S. Ct. 380, 387 (1952). Certiorari should not be granted to review this claim raised now for the first time.

III.

Certiorari Should Not Be Granted To Review A Non-federal Claim Which Was Not Timely Raised Below, Which Was Decided In Conformity With Other Connecticut Decisions, And Which Protests A Practice Since Abandoned In The State.

The defendant also complains that the Connecticut procedure which was followed in this case in securing the bench warrant was improper in that it was issued simply upon the request of the State's Attorney, and was not based upon an oath or affirmation as was required by the Connecticut Constitution.

Several facts are important. First, subsequent to the trial of this case, the Connecticut Supreme Court held that it was violative of the Connecticut Constitution for a bench warrant to issue merely upon the request of the State's Attorney. *State* vs. *Licari*, 153 Conn. 127, 214 A.2d 900 (1965). Consequently, the admittedly improper procedure which was followed in this case has been abandoned in the State of Connecticut. Today, the usual procedure in Connecticut is for the State's Attorney to present a written application for a bench warrant to a judge. Attached to the application are one or more affidavits which the State claims present enough facts upon which the judge may find probable cause for ordering an arrest. (The proposed information in which the crime is charged is also attached to the bench warrant, although Connecticut law does not restrict the State's Attorney from subsequently amending the information.) If the judge finds probable cause, he will issue the warrant.

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Second, the Connecticut Supreme Court did not rule that the proper procedure had been followed by the State in this case. On the contrary, it ruled that the *defendant* had failed to raise a timely objection to the procedure followed. (Def's. App. 18a-19a)

Finally, the decision in this case was perfectly consistent with, and nearly identical to, other Connecticut decisions on the same issue. In *State* vs. *Orsini*, 155 Conn. 367, 379, 232 A.2d 907 (1967) less than a year elapsed between the date of the arrest and the raising of the objection to the bench warrant procedure, the objection again having been raised upon the eve of trial. As in this case, the court held that the defendant had submitted to the court's jurisdiction. See also *Reed* vs. *Reincke*, 155 Conn. 591, 597, 236 A.2d 909 (1967) in which the Connecticut Supreme Court held that it is necessary to raise an objection to the jurisdiction of the person prior to the entry of a plea on the merits in order to avoid a waiver of such a claim.

This court has usually refused to grant certiorari when (a) the practice complained of has been abandoned *Rice* vs. *Sioux City Cemetery*, 349 U.S. 70, 77, 99 L. Ed. 897, 75 S. Ct. 614, 618 (1955) or (b) when the claim has been raised beyond the time permitted by state rules, and hence not considered by the state court *Michel* vs. *Louisiana*, 350 U.S. 91, 97, 100 L. Ed. 83, 76 S. Ct. 158, *reh. denied* 350 U.S. 955, 100 L. Ed. 831, 76 S. Ct. 340 (1955) or (c) when the decision involved is a *state* issue decided in conformity with other decisions of that state. Rule 19. All three of the foregoing traditional reasons for refusing to review a state decision being present with respect to this claim, certiorari ought not be granted to review the former Connecticut bench warrant procedure.

IV.

The Remaining Claims Of The Defendant.

The remaining claims of the defendant do not warrant extended discussion. The third seeks review of a ruling on evidence (the ruling permitted the jury to hear evidence of questions asked of co-conspirators by the police out of the presence of the defendant during the conspiracy.) The fourth seeks review of various rulings permitting declarations of co-conspirators to be admitted in evidence. The fifth seeks review of various rulings sustaining objections to certain questions asked on cross-examination, and in refusing to permit the defense to examine a police officer's notes which notes were not introduced in evidence. The sixth would require an analysis of the evidence introduced to determine whether the court properly refused to charge the jury regarding multiple, as opposed to a single, conspiracy. The seventh again claims the court improperly sustained certain objections during cross-examination. The eighth objects to the use of certain tape recordings. The ninth claims all of the prior alleged infirmities as having some special significance because of their quantity rather than their quality.

All but the eighth — the claim about the tape recordings — struggle to raise the quality of the objection to that of "due process" dimensions. Even if each one had in fact been error, they hardly involve the substantial, important, and nationally significant deprivations of fairness with which this court has traditionally been concerned.

The claim about the tape recordings is misleading. Under "Questions Presented" the defendant forcefully presses his claim. (Def's. Brief p. 6) However, in his argument, he

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admits that the issue was not raised in the state courts until after the decision was rendered by the Connecticut Supreme Court. (Def's. Brief p. 40) Further he fails to offer any reason why an exception to the general rule of refusing to review such a tardy claim should be made in this case.

For the foregoing reasons, certiorari should not be granted to review these remaining claims of the defendant.

CONCLUSION

For all of the reasons presented above, certiorari should be denied.

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CERTIFICATE OF SERVICE

This is to certify that a copy hereof was mailed, pursuant to Rule 33.1 to:

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